

HOGAN & HARTSON
L.L.P.

RECEIVED

FEB 23 1998

DAVID L. SIERADZKI
COUNSEL
DIRECT DIAL (202) 637-6462
INTERNET DS0@DC2.HHLAW.COM

COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
TEL (202) 637-5600
FAX (202) 637-5910

February 23, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M St., N.W.
Washington, D.C. 20054

Re: Telephone Number Portability, CC Docket No. 95-116

Dear Ms. Salas:

On behalf of the Telecommunications Resellers Association, I am enclosing for filing in the referenced proceeding the Opposition of the Telecommunications Resellers Association to the Cellular Telecommunications Industry Association's Petition for Forbearance. Please contact me if you have any questions.

Respectfully submitted,



David L. Sieradzki
Counsel for Telecommunications
Resellers Association

Enclosures

cc: Attached service list

No. of Copies rec'd 045
List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

FEB 23 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Telephone Number Portability) CC Docket No. 95-116
)

**OPPOSITION OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION
TO THE CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION'S PETITION FOR FORBEARANCE**

**TELECOMMUNICATIONS RESELLERS
ASSOCIATION**

Of Counsel:

David Gusky
Vice President and Director
of Wireless Services
TELECOMMUNICATIONS
RESELLERS ASSOCIATION

Linda L. Oliver
David L. Sieradzki
HOGAN & HARTSON, L.L.P.
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600

Counsel for the Telecommunications
Resellers Association

Dated: February 23, 1998

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY	1
I. WIRELESS NUMBER PORTABILITY IS NECESSARY TO PROMOTE COMPETITION AND TO ENSURE REASONABLE RATES, TERMS, AND CONDITIONS FOR CMRS.	3
II. WIRELESS NUMBER PORTABILITY IS NECESSARY TO PROTECT CONSUMERS.	7
III. WIRELESS NUMBER PORTABILITY ADVANCES THE PUBLIC INTEREST.	9
CONCLUSION	12

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Telephone Number Portability)	CC Docket No. 95-116
)	

**OPPOSITION OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION
TO THE CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION'S PETITION FOR FORBEARANCE**

The Telecommunications Resellers Association ("TRA"), 1/ pursuant to the Public Notice, DA 98-11 (Jan. 22, 1998), respectfully submits its opposition to the December 16, 1997 Petition for Forbearance filed by the Cellular Telecommunications Industry Association ("CTIA") in the captioned docket.

INTRODUCTION AND SUMMARY

TRA urges the Commission to deny CTIA's petition. Implementation of long-term service provider number portability by commercial mobile radio service ("CMRS") carriers is critical to ensure that vibrant competition develops in the wireless market and throughout the broader telecommunications marketplace.

Section 10 of the Communications Act ("Act") sets forth three criteria for forbearance, *all* of which must be met before the Commission can forbear from

1/ TRA is a nationwide industry association representing more than four hundred resellers of interexchange, local exchange, and wireless telecommunications services.

applying a requirement. 2/ CTIA's petition should be denied because it satisfies *none* of these statutory criteria, as we show below.

First, number portability is needed to advance competition within the CMRS marketplace, as well as competition between CMRS and wireline services. Such competition, in turn, is necessary to ensure that telecommunications rates, terms, and conditions are reasonable and not unreasonably discriminatory. In particular, number portability will enable consumers to switch easily between wireless facilities-based carriers; and -- critically -- between wireless facilities-based carriers and resellers. This ease of switching forces carriers to reduce their rates and to improve their service offerings in order to attract and retain customers. Number portability is thus essential to real competition, as the Commission has already found.

Second, as the Commission also has already determined, CMRS number portability is critical to protection of the "fundamental rights" of consumers -- including "[t]he right to change carriers without changing telephone numbers" 3/ -- and for ensuring that consumers receive the full benefits of competition.

2/ The criteria are: "(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations . . . for . . . telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance . . . is consistent with the public interest." 47 U.S.C. § 160(a).

3/ Remarks by William Kennard, Chairman, FCC, to the National Association of State Utility Consumer Advocates (Feb. 9, 1998) (available on the Internet at <http://www.fcc.gov/Speeches/Kennard/spwek803.html>) (as prepared for delivery)

Third, the public interest in promoting CMRS competition, and in ensuring the timely development of a national number portability system for the entire public switched network, including the portion of that “network of networks” provided by wireless carriers, far outweighs the CTIA’s concern that implementing number portability would cost CMRS carriers money that they claim otherwise would be devoted to network buildout. CTIA’s claims regarding costs and diversion of funds from network buildout, moreover, are supported by absolutely no factual evidence. If anything, the profitability of CMRS carriers belies such claims.

We discuss these points in greater detail below.

I. WIRELESS NUMBER PORTABILITY IS NECESSARY TO PROMOTE COMPETITION AND TO ENSURE REASONABLE RATES, TERMS, AND CONDITIONS FOR CMRS.

The indispensability of number portability to the development of “meaningful competition” has been recognized by Congress and by the

(“*Kennard 2/9/98 Speech*”); Remarks by William Kennard, Chairman, FCC, to the Practicing Law Institute (Dec. 11, 1997) (available on the Internet at <http://www.fcc.gov/Speeches/Kennard/spwek702.html>) (as prepared for delivery) (“*Kennard 12/11/97 Speech*”).

Commission. 4/ The Commission has stated,

The ability of end users to retain their telephone numbers when changing service providers gives customers flexibility in the quality, price, and variety of telecommunications services they can choose to purchase. Number portability promotes competition between telecommunications service providers by, among other things, allowing customers to respond to price and service changes without changing their telephone numbers. The resulting competition will benefit all users of telecommunications services. . . . Conversely, the record demonstrates that a lack of number portability likely would deter entry by competitive providers of local service because of the value customers place on retaining their telephone numbers. 5/

Significantly, the Commission's findings regarding the benefits of number portability for competition were not limited to wireline carriers. To the contrary, the Commission specifically found that requiring implementation of number portability by CMRS carriers would advance competition among CMRS providers, and between wireless and wireline carriers, and would thereby create incentives for carriers to offer lower prices and to develop new services and technologies:

Removing barriers [to competition among cellular, broadband PCS, and covered SMR providers], such as the requirement of changing telephone numbers when changing providers, will likely stimulate the development of new services and technologies, and create incentives for carriers to lower prices and costs. . . .

4/ *Telephone Number Portability*, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8367, ¶ 28 (1996) (*Number Portability First R&O*), *recon.*, First Memorandum Opinion and Order on Reconsideration, FCC 97-74 (released Mar. 11, 1997) (*Number Portability Recon Order*).

5/ *Number Portability First R&O*, 11 FCC Rcd at 8368, ¶¶ 30-31.

We further conclude that number portability will promote competition between CMRS and wireline service providers as CMRS providers offer comparable local exchange and fixed commercial mobile radio services. . . . [S]ervice provider portability will encourage CMRS-wireline competition, creating incentives for carriers to reduce prices for telecommunications services and to invest in innovative technologies, and enhancing flexibility for users of telecommunications services. 6/

Not only is number portability essential to promote competition among facilities-based carriers, it also is critical to promoting competition by wireless resellers and to ensuring that competition in full-service offerings will be as vigorous as possible. The Commission has recognized the importance of resale-based CMRS competition in lowering rates, discouraging unreasonably discriminatory practices, reducing the need for detailed regulatory intervention, promoting innovation, and other pro-competitive benefits. 7/ TRA has verified the important role of resale-based CMRS competition in lowering prices through empirical studies showing that resellers' rates are, on average, about 10% lower than the rates charged by facilities-based CMRS carriers. 8/ Wireless resale also

6/ *Id.*, 11 FCC Rcd at 8433-37, ¶¶ 155, 158, 160. *See also Number Portability Recon Order*, ¶ 142 (reaffirming conclusion that "provision of number portability by CMRS carriers is important to competition").

7/ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, First Report and Order, 11 FCC Rcd 18455, 18462, ¶ 10 (1996) ("CMRS Resale Order"), *pets. for recon. pending, pet. for review pending sub nom. Cellnet Communications, Inc. v. FCC*, No. 96-4022 (6th Cir.).

8/ National Wireless Resellers Association ("NWRA"), *1997 Survey of Wireless Resellers* at 6 (July 1997), attached as Exhibit A to NWRA's July 2, 1997 Comments in Opposition to the Petition for Forbearance of the Broadband PCS Alliance of the Personal Communications Industry Association (DA 97-1155); TRA, *1997 Year End Survey of Wireless Resellers* at 5 (attached to letter from Ernest B. Kelly, III,

enables a wide range of potential competitors (including all those carriers that do not happen to hold a wireless license in each market) to provide full-service packages that include local wireline, interexchange, wireless and other services. Wireless number portability is essential to eliminating barriers to switching customers among carriers, just as it is in the wireline market.

The Commission has chosen to rely principally on competition, rather than traditional tariff regulation of rates or other terms and conditions, to ensure that CMRS carriers' rates, terms, and conditions are reasonable and not unreasonably discriminatory. ^{9/} While there is a degree of competition in CMRS marketplace, it is clear that number portability would intensify such competition, because it would remove an impediment to switching to another carrier with better prices or service offerings. Given the central role that competition plays in implementing the Commission's statutory obligation to ensure just, reasonable, and not unreasonably discriminatory rates, terms, and conditions -- and the Commission's forceful conclusions regarding the importance of number portability in promoting competition -- the Commission, under Section 10, simply cannot

President, TRA, to William Kennard, Chairman, FCC, Feb. 10, 1998). The NWRA, representing resellers of wireless services, recently merged with TRA.

^{9/} *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1478-79, ¶¶ 173-75 (1994) (forbearing to apply tariffing and certain other Title II requirements to CMRS carriers because competition, as well as the continued applicability of Sections 201, 202, and 208 of the Act, will ensure reasonable rates, terms, and conditions).

conclude that the implementation of number portability by CMRS carriers is unnecessary to ensure that charges are just, reasonable, and nondiscriminatory.

II. WIRELESS NUMBER PORTABILITY IS NECESSARY TO PROTECT CONSUMERS.

Consumers, not CMRS providers, are the direct “intended beneficiaries” of the Commission’s policies on number portability, contrary to the assertions of CTIA. ^{10/} CTIA thus bears a heavy burden in demonstrating that number portability is not necessary to “protect consumers,” as it must to justify forbearance.

The Commission has already found that, both as a general matter and in the specific CMRS context, number portability protects consumers’ ability to switch between service providers seamlessly, thus “creating incentives for carriers to reduce prices for telecommunications services and to invest in innovative technologies, and enhancing flexibility for users of telecommunications services.” ^{11/}

The Commission’s established commitment to protecting consumers through pro-competitive measures such as number portability has been described by Chairman Kennard in several recent speeches. The Chairman has articulated

^{10/} CTIA Petition at 4.

^{11/} *Number Portability First R&O*, 11 FCC Rcd at 8437, ¶ 160.

what he calls a "Consumer Bill of Rights for Telecom Competition:"

Our job at the FCC is to break down barriers to choice -- *choice in wireless*, choice in long distance, and choice in local telecommunications. Common sense tells us that where there is real choice, competition is working and the consumer is king. In fact, competition means that the consumer must have certain *fundamental rights* in the telecommunications marketplace:

1. Consumers must have the right to chose providers -- from as wide a variety of providers as the market will bear.
2. *Consumers must be able to move from one provider to the other.*
3. *Consumers must be able to move without changing numbers.*
4. Consumers must not be forced to dial extra digits simply because they choose a competitive carrier rather than an incumbent.
5. Consumers must be able to change carriers without paying unnecessary fees. 12/

Of course, the third item on this Bill of Rights, and to a very great extent the first and second items as well, can be summarized in two words: "number portability."

Significantly, Chairman Kennard notes that "competition is not an end in itself.

Competition must serve consumers." In other words, number portability is not only important because it advances competition; as a "fundamental right" of consumers, number portability is a goal in and of itself. The "fundamental right" is no less important during the near term than after the end of the five-year PCS build-out period.

12/ Kennard 12/11/97 Speech (emphasis added).

CTIA mistakenly states that “the immediate intended beneficiaries of number portability [are] PCS carriers,” and states that a majority of its members do not deem the near-term implementation of number portability to be a high priority. ^{13/} But “[t]he rights of carriers derive from the rights of consumers” ^{14/} The intended beneficiaries of number portability are not carriers, but *consumers*, both of wireline and wireless telecommunications services. The Commission cannot, under Section 10, conclude that number portability is not necessary to advance the interests of consumers.

III. WIRELESS NUMBER PORTABILITY ADVANCES THE PUBLIC INTEREST.

The Commission may not forbear under Section 10 unless it finds that forbearance from applying a rule would be consistent with the public interest. ^{15/} But the Commission has already found that implementation of number portability -- including its implementation by wireless carriers -- would generate tremendous public interest benefits. ^{16/} CTIA’s petition would be convincing only if it could show that an alternative public interest goal outweighs the benefits of number portability. But CTIA has made, and could make, no such showing.

^{13/} CTIA Petition at 4.

^{14/} *Kennard 12/11/97 Speech*.

^{15/} 47 U.S.C. § 160(a)(3).

^{16/} *See supra* pp. 3-6 and cases cited therein.

CTIA's only public interest argument against implementing number portability is its simple statement (without economic support or data of any kind) that implementation is costly and that it would divert CMRS carriers' finite resources from network buildout and price reductions. Even assuming the truth of CTIA's unsupported assertion that implementation is costly, there is no evidence that money saved on number portability implementation would necessarily go to network buildout or lower rates rather than to higher profit margins.

CTIA's argument also is highly suspect from an industry that is resource-rich and growing richer. CTIA itself reports that the U.S. cellular, PCS, and ESMR industries generated \$25.6 billion in annual revenues last year. Annual revenues grew by 19% from 1996 to 1997 and by almost 300% since 1992. ^{17/} As a recent article observed, "while prices have fallen, cellular profitability has crept higher," with operating margins of 40 percent or more. ^{18/} And the substantial sums bid at recent FCC auctions for wireless services are an indication of the continued availability of investment capital for building out and developing wireless services. CTIA provides absolutely no factual support for its contention that the industry is somehow short of resources for network buildout. Nor has CTIA attempted to prove -- as it likely cannot -- that money saved on number portability

^{17/} CTIA's Annualized Wireless Industry Data Survey Results, June 1985 to June 1997 (available on the Internet at <http://www.wow-com.com/professional/reference/graphs/gdtable.cfm>).

^{18/} "Cellular Profitability Not a Casualty," *Wireless Week*, December 1, 1997, citing data compiled by the Strategis Group.

implementation would necessarily be devoted to network buildout rather than higher profits or other activities.

Moreover, the Commission already has rejected CTIA's contention that the cost of implementing number portability is not justified because it would divert resources from network buildout and price reductions. To the contrary, the Commission held that the increased competition that number portability will generate will create even stronger incentives for wireless carriers to improve their networks, develop new technologies, and reduce prices. ^{19/} Moreover, because number portability will spur more intense competition among CMRS carriers, and between CMRS and wireline carriers, the public interest in number portability exceeds any interest there may be in the goal CTIA identifies -- in essence, keeping more money for certain companies.

Tellingly, CTIA indicates that some of its members may be concerned about what one writer characterizes as "the fury of churn" and the "fierce battle to gain and retain elusive customers." ^{20/} But another word for "churn" is "competition." It is exactly this fierce and furious competition, engendered in significant part by number portability (which makes it much easier for consumers to switch among carriers), that is necessary to ensure reasonable and competitive rates. Far from being a "diver[sion]", ^{21/} implementation of number portability is

^{19/} See *supra* pp. 3-6 and cases cited therein.

^{20/} CTIA Petition at 3 n.6.

^{21/} *Id.* at 4.


vital to protecting consumers and ensuring that competition takes root and intensifies.

CONCLUSION

For the reasons discussed above, the Commission should ensure that CMRS number portability is implemented in as timely a manner as possible, and should deny CTIA's forbearance petition.

Respectfully submitted,

TELECOMMUNICATIONS RESELLERS
ASSOCIATION

By: 

Of Counsel:

David Gusky
Vice President and Director
of Wireless Services
TELECOMMUNICATIONS
RESELLERS ASSOCIATION

Linda L. Oliver
David L. Sieradzki
HOGAN & HARTSON, L.L.P.
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600

Counsel for the Telecommunications
Resellers Association

Dated: February 23, 1998

CERTIFICATE OF SERVICE

I, Rebecca G. Wahl, hereby certify that a copy of the foregoing
Opposition of the Telecommunications Resellers Association to the Cellular
Telecommunications Industry Association's Petition for Forebearance was served by
hand delivery upon the following:


Rebecca G. Wahl

Dated: February 23, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Chairman William E. Kennard
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, NW, Room 832
Washington, DC 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
1919 M Street, NW, Room 802
Washington, DC 20554

Commissioner Michael Powell
Federal Communications Commission
1919 M Street, NW, Room 844
Washington, DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
1919 M Street, NW, Room 826
Washington, DC 20554

Richard Metzger
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 500
Washington, DC 20554

Daniel Phythyon
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5002
Washington, DC 20554

John Cimko
Chief, Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5202
Washington, DC 20554

David Furth
Chief, Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 7002
Washington, DC 20554

Jane Jackson
Acting Chief, Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 500
Washington, DC 20554

Carol Matthey
Chief, Policy Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 544
Washington, DC 20554

Janice Jamison
Wireless Telecommunications Bureau
Federal Communications Commission
2100 M Street, NW, Room 700
Washington, DC 20554

David Wye
Sr. Advisor for Spectrum & Technology Policy
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5002
Washington, DC 20554

International Transcription Services, Inc.
2100 M Street, NW, Suite 140
Washington, DC 20037

Michael F. Altschul
Randall S. Coleman
Cellular Telecommunications Industry
Association
1250 Connecticut Avenue, NW, Suite 200
Washington, DC 20036